IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

CRL.A.No. 1776 of 2005()

SC.150/2004 of V ADDL.SESSIONS COURT, ERNAKULAM
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APPELLANT: 1ST ACCUSED:

ANIL @ ANI, S/O. AYYAPPAN,
CONVICT NO.4621, CENTRAL PRISON, VIYYUR.

BY ADV. SRI.C.A.ANUPAMAN
SRI.P.N.SASIDHARAN
SRI.ICANS C.CHAMAKKALA

RESPONDENTS: COMPLAINANT:

STATE,
REP.BY C.I. OF POLICE, TRIPUNITHURA.
CRIME NO.289/98.

BY PUBLIC PROSECUTOR SHRI K.C. SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. Koshy & T.R. Ramachandran Nair, JJ.

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pending the trial.

2. The prosecution case can be summarised thus:

3. On 26.12.1998 at 12.30 a.m. in the night, all the accused trespassed into the residential compound of the deceased. The accused committed murder of the deceased by Ajayan, the absconding accused attacking the deceased with a sword-stick and thereby causing injuries on his head and neck and appellant beating him with stick and thereafter the deceased was dragged to the rear side of the residential house by all the accused and Ajayan cut the deceased with the sword-stick on his head and the neck and accused 1 to 3 and the deceased Unnikrishnan caused hurt by beating the deceased with wooden sticks as well as hitting him with pieces of concrete block and thereby causing his death.

4. The First Information Statement, Ext.P1, was given at 6.30 a.m. on 27.12.1998 by P.W.1, the brother-in-law of the deceased. The F.I.R. (Ext.P17) was registered by P.W.18. P.Ws.1 to 18 were examined and Exts.P1 to P27 were marked as well as M.O.1 to M.O.14 which were also identified and marked.

5. The learned Sessions Judge found on the evidence of the eye witnesses, P.W.1 and P.W.2, that the appellant is guilty. The evidence of eye witnesses is corroborated by the recovery of M.O.1 stick used by the

accused. The learned Sessions Judge, after elaborate discussion of the evidence and circumstances involved in the case, found that charges stood proved against the appellant herein.

6. Counsel for the appellant argued that P.W.1 and P.W.2 could not be believed when they speak about the occurrence, as they are only chance witnesses who could not have been there on the date of occurrence. At any rate, they are interested witnesses, as are closely related to the deceased. It is also argued that there was no sufficient light at the time of occurrence and therefore P.W.1 and P.W.2 could not have identified the accused and in the absence of a test identification parade, their evidence is not trustworthy. It is also argued that the prosecution has failed to examine another eye witness, CW.2 who is the father of the deceased and no proper explanation is offered for his non-examination, and thereby the same is fatal to the prosecution case. It has further been contended that the injuries found do not tally with the overt acts alleged and the medical evidence also does not support the prosecution case, in that the injuries might not have been caused by the weapons recovered.

7. In view of the submissions made, it is necessary to have a detailed discussion of the evidence of P.W.1 and P.W.2. P.W.1 is the brother in law of the deceased who is an eye witness to the incident. The other witnesses,

P.Ws.3 to 6 who were examined by the prosecution, turned hostile. But they have also stated that the deceased was lying with bleeding injuries on the rear side of the house on the midnight of 26.12.1998, i.e. at 12.30 a.m. on 27.12.1998.

8. P.W.1 in his evidence, has clearly deposed about the infliction of injuries on the deceased by the appellant, deceased Unnikrishnan and the absconding accused and accused Nos.2 to 4. He is an employee of the Central Administrative Tribunal, Ernakulam and is the brother in law of the deceased. Even though he was residing at Poonithura, on the date of occurrence he was very much present in the house of the deceased. According to him, he came along with his wife at 10 a.m. on 26.12.1998, as the mother-in-law was not well for some time past and they came on a routine visit. After taking food by about 10 p.m., they went to bed. Immediately after 12 a.m. they heard somebody calling the deceased by his name and hearing this, deceased and his father came out to the sit out after switching on the electric light. They heard the accused calling the deceased by name and asking him to come out. He also heard the deceased asking the absconding accused Ajayan, what was the problem. The absconding accused along with deceased Unnikrisnnan, appellant and accused 2 and 3 trespassed into the compound by scaling down the compound wall. Ajayan

was having a sword stick with him and Unnikrishnan, appellant and the second accused were having sticks each with them. When the absconding accused aimed a sword-stick against the decased, the deceased cried requesting him not to attack him and ignoring it, Ajayan attacked by the sword-stick and the appellant and the second accused beat him with sticks. This happened on the southern courtyard and when P.Ws.1 and 2 and C.W.2 tried to intervene and made a hue and cry, they were prevented by Ajayan who aimed the sword-stick against them. Fearing attack, they drew backwards. At that time the deceased was caught hold of by accused 1 to 3 and the other accused and was brought to the rear side of the house through the eastern side. P.W.1 and others followed them while crying and found Ajayan inflicting cut injuries on the head of the deceased and the appellant and second accused beating him with sticks and accused No.3 beating him with his hand. He also saw Unnikrishnan and accused No.3 attacking the deceased with concrete blocks. Hearing the hue and cry raised by P.W.1 and others and on seeing that people are coming to the place, the accused scaled down the compound wall and went through the road. The deceased was lying at that time unconscious under a coconut tree on the rear side of the house. Somebody informed the Flying Squad and they came and removed the deceased to the hospital. After two days, the deceased

succumbed to the injuries. Ext.P1 was given by P.W.1 at the Medical Trust Hospital on 27.12.1998. According to the evidence of P.W.1, the accused had a grudge against the deceased, in that they had destroyed the compound wall of the house of the deceased about 2-3 months before, for which there was a complaint before the police and the same was settled by the accused paying compensation to the deceased. They were nurturing a grudge against the deceased from then onwards. He also identified M.O.1 as the weapon used by the appellant. He was categoric that the appellant (accused No.1) was wearing M.O.7 ash coloured shirt. Regarding the sufficiency of electric light also, he has given clear evidence that they came out of the room to the sit out after putting the light. Further, a tube light was being put on, on the northern side of the house throughout night in addition to a bulb, as the bathroom was at some distance and it was being done for the convenience of the mother to go to the bathroom in the night. In the cross examination, P.W.1 reiterated that accused No.1 was wearing an ash coloured shirt on the fateful day which he identified as M.O.7. In the cross examination for accused No.4 also, P.W.1 categorically stated that accused No.1 was wearing M.O.7 shirt at the time of occurrence.

10. The evidence of P.w.1 is amply corroborated by the evidence of P.w.2 who is the sister of the deceased and wife of P.W.1. The sequence of

events has been spoken to by her as stated by P.W.1. P.W.2 also stated that immediately after Prasad came out of the house to the yard, the accused five in numbers, scaled down the compound wall and the absconding accused brandished a sword-stick on the deceased. According to her, ignoring the protest raised by P.W.1, P.W.2 and the father, the absconding accused came near them with a sword-stick threatening that they will be murdered. She has categorically stated that deceased was taken to the rear side of the house by the accused and she was familiar with them as they had visited the house on several occasions before. The overt acts attributed to the appellant, accused No.2 and Unnikrishnan have been stated by her, and she saw them attacking the deceased with the sticks. She has also stated that when the deceased fell down also, accused 1 and 2 and Unnikrishnan were beating him with the sticks and she identified M.O.1 as the stick used by accused No.1. The remaining part of the incident where the deceased was given blows by concrete blocks is also spoken to by her. She has clearly stated that accused 1 and 2 and deceased Unnikrishnan were having sticks and Ajayan was having sword-stick in his hand. Regarding the availability of light at the scene, she deposed that when they came out from the house to the sit out, light was put on and for the convenience of the mother to reach the bathroom, light will be switched on throughout night in that portion

also. The motive alleged by the prosecution regarding previous enmity was also spoken to by her and she further stated that the accused had to part away Rs.5,000/- towards settlement and they were having enmity towards the deceased for this. M.O.7 shirt was identified by her as the shirt worn by accused No.1 at the time of occurrence. In cross-examination for accused 1 and 2, she has clearly stated that accused No.1 used to come to the house for selling fish and therefore he was familiar to her. She had seen the appellant wearing M.O.7 shirt previously also. She has categorically stated in cross examination also that P.W.1 and C.W.2 were there along with her during the time of attack. The evidence of P.W.2 could not be shaken in the cross examination. She has clearly stated that the name of accused No.1 was clearly disclosed by her and all the accused were familiar as they had been to the house on previous occasions. She has categorically repeated in her cross examination that a bulb and a tube light were being switched on usually on the northern side of the house which was actually put on during night on that day also. In cross examination for accused No.4 also, she has repeatedly stated that accused No.1 was wearing M.O.7 ash coloured shirt.

11. On analysing the evidence of P.Ws.1 and 2, it will be evidently clear that they have convincingly spoken about the entire occurrence and have seen the overt acts attributed to the appellant. The evidence of P.w.1 is

amply corroborated by the evidence of P.W.2. The argument of the counsel for the appellant that they were only chance witnesses, is only to be rejected. The mother was ill for some months back onwards and they had arrived in the house in the morning on 26.12.1998. Such visits cannot be said to be unusual. Apart from that, P.W.5 is a neighbour who had rushed to the scene immediately after this incident. Even though he was declared hostile, he has also spoken about the presence of P.Ws.1 and 2 near the injured deceased when he came to the scene. In view of the above clear evidence adduced by the prosecution, it cannot be said that P.Ws.1 and 2 are only chance witnesses and that they could not be believed. We are not impressed by the argument that there was no sufficient light for P.Ws.1 and 2 to witness the entire incident. P.Ws.1 and 2 have clearly spoken to the fact that when the deceased came out along with the father and P.W.1, they had switched on the light in the sit out. It is also clearly stated by them that tube light and bulb were switched on for enabling the mother to go to the bathroom, as usual. P.W.3 and P.W.6 even though turned hostile, have also spoken about the presence of light at the scene when they rushed into there on hearing cry. Hence, the argument built up by the counsel for the appellant that there was no sufficient light in the scene is only to be rejected. Further, the scene mahazar, Ext.P10, also shows that on the north-eastern corner, there is

a bulb and there are tube lights on the sit out as well as on the rear side. Hence, we find that the findings rendered by the learned Sessions Judge regarding the acceptability of evidence of P.Ws.1 and 2 are correct and are not liable to be interfered with.

13. Ext.P12 is the postmortem certificate and the following injuries have been recorded in it.

> "1. Sutured skind deep wound irregular in shape 4 cm x 2 cm on the right side of front of head, 5 cm above middle of right eye brow.
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> 2. Sutured skin deep wound 0.5cm long on the right side of top of head 12 cm above right ear.
>
> 3. Sutured skin deep wound irregular in shape 3.5 x 2cm on the back of head 8 cm above external occipital protuberance.
>
> 4. Three sutured skin deep wounds 3cm, 3cm and 5cm over an area 11 x 7 cm on the left side of back of head 5 cm behind left ear.
>
> 5. Contused abrasions 12 x 4cm over the left mastoid and adjoining area of head and neck.
>
> 6. Abrasion 0.5 x .5cm on the middle of the lower lip.
>
> 7. Multiple small contused abrasions 7x2cm on the right end of forehead and eye brow.
>
> 8. Abrasion 0.3x0.1cm on the right side of front of neck 5cm above middle of right clavicle and 5cm outer to midline.
>
> 9. Multiple small contused abrasions over an area 13x12cm on the top front and outer side of right shoulder.
>
> 10. Abrasion 4x0.5cm on the front of right upper arm 5cm above elbow.

11. Multiple small abrasions over an area 17x4 cm on the back of right elbow and upper half of forearm.

12. Three skin deep sutured wounds, 2cm long on the interdigital cleft between right index finger and thumb, 1 cm long palmer aspect of lower end of right index finger and 1 cm long on the palmer aspect of lower end of middle finger.

13. Abrasion 3 x 1 cm on the inner malleolous of right foot.

14. Multiple contused abrasions 41 x 2 to 5 cm involving outer side of lower end of right thigh and outer side of right leg.

15. Contused abrasions 6x3cm on the top of left shoulder.

16. Contused abrasions 23x5cm on the front and inner side of left upper arm.

17. Multiple small contused abrasion 8x3cm on the outer side of left wrist and adjoining area.

18. Three skin deep sutured wounds, 3cm long on the outer side of root of left thumb, 1cm long on interdigital cleft between left thumb and index finger and 5cm long on the outer part of left palm.

19. Sutured wound 2cm on the back of left hand close to the root of ring finger.

20. Multiple small contused abrasions over an area 5x1cm on the back of left hand and back of middle and index fingers.

21. Contused abrasion 2.5 x 1cm on the inner side of left leg 6cm above ankle.

22. Incised wound 2cm x 0.8cm horizontal on the left side of chest 10cm below maxilla 7cm outer to left nipple. The wound just entered the chest cavity without injury to the lung.

23. Contused abrasion 7x4cm on the left side of front of chest 2cm

outer to midline and 10cm below clavicle.

24. Linear abrasion 2.5cm horizontal on the front of left side of chest 7cm above nipple.

25. Contused abrasion 2x0.5 cm on the lower end of back of neck.

26. Multiple contused abrasions 44x30cm on the back of trunk extending from the neck downwards.

27. Multiple contused abrasion 40x8 to 10 cm on the back of right thigh and upper part of right leg. All the above injuries showed partial healing.

28. Dissection of head showed scalp contused all over the head. Skull showed comminuted fracture over an area 14x11cm involving left temporal, parietal, frontal and left side of occipital hones. Subdural clot 10x5x1cm on the left temporoparietal area. Diffuse sub arachnoid hemorrhage all over the brain. Contusion on the front and under surface of right frontal and temporal lobes and outer side of right temporal lobe. Flattening of gyri and obliteration of suici seen.

29. Left side ribs 6, 7 and 8 fractured on the back part. Left lung showed contusions on the back. Left chest cavity contained 200ml of blood. "

P.W.10 is the Asst. Professor of Forensic Medicine, Medical College Hospital, Alappuzha who had conducted the postmortem examination on the deceased. The injuries will show that there was fracture on the left side ribs 6, 7 and 8 on the back part and very serious head injuries were also caused. P.W.10 has clearly and categorically given the opinion that the injuries stated are sufficient in the ordinarily course of nature, to cause death and that most of the injuries noted by him could be caused by striking or hitting

with sticks like M.O.1 and M.O.2 and with pieces of concrete blocks like M.O.3 and M.O.4. P.w.13 is the doctor who had examined the deceased immediately after he was brought to the hospital and Ext.P15 is the certificate issued by the said doctor. P.W.13 has also spoken about the details of injuries and the fact that the deceased never regained consciousness after being admitted in the hospital. The doctor has also deposed that there was fracture of skull and that the injuries could have been caused if struck or hit with M.O.1 and M.O.2 and also by M.Os.3 and 4. Thus, the evidence of P.W.10 is fully supported by the evidence of P.W.13 also.

14. It is argued by the counsel for the appellant that the prosecution has suppressed material evidence by not examining C.W.2, the father of the deceased and that no explanation has been offered for his non-examination. We find that the said argument has no merit. The presence of P.W.1 and P.W.2 at the scene of occurrence along with C.W.2 has been clearly proved. P.W.1 and P.W.2 have clearly and categorically deposed about the entire incident and it need not be multiplied by the evidence of C.W.2. We find that the evidence of P.W.1 and P.W.2 are cogent and convincing. It has been clearly found by the learned Sessions Judge that the non-examination of C.W.2 is not fatal to the prosecution since the presence of P.Ws.1 and 2

at the time and place of incident has been amply proved. Further, we find that the presence of P.Ws.1 and 2 have not been specifically challenged in the cross examination. Their presence is also spoken to by P.Ws.5 and 6. Even though they were treated as hostile, this part of their evidence can be accepted. It is well settled that the part of the evidence of hostile witnesses can be relied upon, for the purpose of corroboration.

15. The prosecution further relies upon the recovery of M.O.1 and M.O.7 to connect the appellant with the crime. The recovery of M.O.1 has been effected based on the disclosure by first accused himself and the disclosure statement is admissible under Section 27 of the Evidence Act. P.W.17, the investigating officer has testified about the statement of the appellant leading to the recovery. It was stated by P.W.17 that when the first accused was arrested, he had given a statement leading to the discovery of the fact that the stick used by the appellant was thrown by him to a place full of bushes situated towards the south of the railway line leading to Irumpanam railway yard and the appellant further stated to him that if he is taken to that place, he will show the place where the wooden stick was thrown by him. Ext.P13 is the seizure mahazar of M.O.1. The statement given by the appellant leading to the discovery of the fact about the concealment of the weapon used for the offence is detailed in Ext.P.13 and

there is nothing to discredit the said recovery. Evidence to this aspect was given by P.W.17, which was rightly accepted by the lerned Sessions Judge. Hence, the same is also a circumstance corroborating the part played by the appellant in the whole incident. P.W.11 is a witness to Ext.P13 seizure mahazar.

16. Importantly, there is one more clinching evidence connecting the appellant with the crime. As already discussed, P.Ws.1 and 2 were categoric that the appellant was wearing an ash coloured shirt at the time of the occurrence and P.W.2 has seen him on several previous occasions wearing the same shirt. M.O.7 is the shirt which has been identified by P.Ws.1 and 2 as the one worn by the appellant at the time of commission of the crime. The appellant was arrested from the house of accused No.4. When the appellant was arrested, he had disclosed that the shirt was handed over by him to accused No.4. When accused No.4 was arrested and on questioning him about the shirt, he disclosed the place where it was concealed and the same was taken out from that place. P.W.15 is a witness to Ext.P14 mahazar, as per which M.O.7 shirt and M.O.8 polythene cover in which the shirt was concealed, were seized by P.W.17. As P.Ws.1 and 2 have clearly identified M.O.7 in Court, we find no reason to disbelieve that version also. Further, M.O.7 was subjected to chemical examination and

Ext.P27 shows that human blood was detected in M.O.7. M.O.7 was stained with human blood. It is clear from these clinching evidence that the evidence of P.Ws.1 and 2 is amply corroborated. Therefore, their evidence cannot be rejected as given by chance witnesses. As the incident occurred in the residential house where they were also present, they are only natural and probable witnesses to the occurrence. It is also of no importance that P.Ws.1 and 2 are closely related to the deceased as the incident occurred in the residential house itself during night where P.Ws.1 and 2, the deceased with his father and mother, were staying. Therefore, we find that the evidence of P.Ws. 1 and 2 are convincing, clear and cogent and they are only natural witnesses to the entire incident and the defence has failed to shake their evidence or contradict it by other evidence. For the same reason, the argument that they are interested witnesses and therefore their evidence is liable to be rejected in toto, is without any substance.

17. The prosecution had examined P.Ws.3 to 6 also to support the prosecution case, but they were declared hostile. But some aspects of their evidence is also relevant to appreciate the evidence of P.Ws.1 and 2. P.W.3 in his deposition, has stated that he found the deceased lying down in a pool of blood and there was sufficient light. P.W.5 also deposed that when he reached the scene of occurrence, he found P.Ws.1 and 2 near the deceased.

P.W.6 also deposed about the presence of P.Ws.1 and 2 at the scene of occurrence. He has also stated about the presence of sufficient light by way of a tube light and another bulb seen switched on outside the house.

18. One of the arguments raised by the counsel for the appellant is that there have been contradictions in the deposition given by P.Ws.1 and 2 and hence their evidence should be rejected in toto. The contradictions pointed out is that while P.W.1 stated that the deceased along with C.W.2 came out of the house hearing the accused calling the deceased by name, P.W.2 in her evidence stated that immediately after hering the noise, she along with P.W.1 came out to the sit out portion and switched on the light. We find that there is not much contradiction in the evidence given by P.Ws.1 and 2. Herein is a case where the occurrence was on the midnight of 26.12.1998 and the witnesses were examined six years after the date of occurrence. Therefore, minor contradictions like the one pointed out, even if is there, since the substratum of the prosecution case has not been shaken, those can only be ignored. This aspect has been pointed by the Honourable Supreme Court in **B.K. Channappa v. State of Karnataka** (AIR 2007 SC 432). That was a case where witnesses were examined after five years and the Honourable Supreme Court was pleased to point out that in such circumstances, discrepancies in testimonies are bound to occur in their

evidence which cannot be treated as serious and significant, so as to disbelieve and discard the substratum of the prosecution case. Therefore, following the above principle, we reject the said argument.

19. The learned Sessions Judge did not find favour with the argument that there was delay in registering the First Information Report also. There was a further argument that the First Information Statement of P.W.1 was delayed. The deceased was taken to the hospital by the Flying Squad and at that time their responsibility was to see that immediate medical attention is given to him. P.W.1 has categorically stated that he had to collect money for going to the hospital and for that he had to reach his house. This explanation is probable and convincing and hence it cannot be said that there was any unexplained delay in recording the F.I. Statement. It is settled law that delay in filing the F.I.R. itself cannot be a ground to doubt the prosecution case and discard it. The Court has to see whether any plausible explanation has been offered, and if offered, whether it is satisfactory (**Sahebrao and another v. State of Maharashtra -** AIR 2006 SC 2002). Therefore, the argument raised by the appellant in this regard is without any substance. We reject the same.

20. As we found earlier, the evidence of P.Ws.1 and 2 who are eye witnesses to the incident, is clear and convincing. The complicity of

accused No.1 is clearly spoken to by them and the overt acts have also been clearly stated. P.Ws.1 and 2, as we find earlier, are natural witnesses to the occurrence and their evidence has not been shaken in any manner whatsoever. Coupled with the same, the recovery of M.O.1 as well as M.O.7 clearly connects the complicity of the appellant with the offence and the evidence of P.Ws. 1 and 2 is clearly corroborated by the said evidence also. In the light of the above, we find that the appeal deserves no merit and the same is dismissed confirming the conviction and sentence awarded by the Court below.

(J.B. Koshy, Judge.)

(T.R. Ramachandran Nair, Judge.)

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J.B. Koshy & T.R. Ramachandran Nair, JJ.

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Crl. Appeal NO.1776 of 2005

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JUDGMENT

15th day of February, 2007